CCG Concrete Constructions (M) Sdn Bhd v Rich Avenue Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D1-22-1723 OF 1998
MOHD GHAZALI J
14 JULY 2000

Civil Procedure *— Stay of proceedings — Arbitration — Whether proceedings should be stayed — Whether 'dispute' existed between parties — Whether services of expert arbitrator required — Arbitration Act 1952 s 6*

The plaintiff was a contractor of the defendant and had carried out the construction of the superstructure works for the proposed Seri Duta condominium for the plaintiff. The works had been completed as certified by the architect's final certificate dated September 1997 which certified some RM1.65m as being due and payable to the plaintiff within one month thereof. The plaintiff paid some RM230,000 in February 1998 leaving a balance of some RM1.42m due to the plaintiff. The defendant failed to pay this amount and the plaintiff filed this suit. The defendant entered conditional appearance and applied for a stay of the proceedings pending reference of this dispute to arbitration as provided for under the contract between the parties. The plaintiff submitted that there was no 'dispute' to be referred to arbitration as all that had happened was that the defendant refused to pay to the plaintiff a sum of money that had been duly certified as due. The registrar refused the defendant's application. The defendant appealed.

Held, dismissing the appeal and ordering the defendant to enter a defence with 14 days:

(1) Under s 6 of the Arbitration Act 1952, the court has a discretion whether or not to order a stay of the proceedings pending reference to arbitration. The plaintiff had, in this instance, shown sufficient cause why effect should not be given to the arbitration clause (see p 55E–F).

(2) By making part payment of the money certified due under the final certificate, the defendant admitted the correctness of the amount stated in the final certificate. The defendant should thus be estopped from disputing the correctness or validity of the final certificate (see pp 55H–56A).

(3) The final certificate, issued by independent professionals engaged by the defendant, was conclusive evidence of the works having been properly carried out and completed in accordance with the terms of the contract. Thus there was no 'dispute' to refer to arbitration (see p 56A–C).

(4) The plaintiff's claim was of a monetary nature and the defendant's complaints, even if true, were not of such a technical nature as to require the services of an expert arbitrator (see p 56E–F).

(5) The defendant had denied receipt of the final certificate, a condition precedent to payment. However, the evidence showed that the defendant had been given the final certificate (see p 56F–G).

[Bahasa Malaysia summary

Plaintif merupakan seorang kontraktor bagi pihak defendan dan telah menjalankan pembinaan kerja-kerja 'superstructure' untuk kondominium Seri Duta plaintif yang dicadangkan. Kerja-kerja tersebut telah disempurnakan seperti yang diperakui oleh sijil muktamad akitek bertarikh September 1997 yang memperakui kira-kira RM1.65 juta sebagai terhutang dan harus dibayar kepada plaintif dalam tempoh sebulan. Plaintif telah dibayar kira-kira RM230,000 pada bulan Februari 1998 meninggalkan jumlah sebanyak RM1.42 juta yang harus dibayar kepada plaintif. Defendan gagal membayar jumlah ini dan plaintif memfailkan guaman ini. Defendan telah memasukkan kehadiran bersyarat dan memohon supaya prosiding digantung sementara menunggu rujukan pertikaian ini kepada timbangtara seperti yang diperuntukkan di bawah kontrak di antara pihak-pihak. Plaintif berhujah bahawa tiada 'pertikaian' untuk dirujuk kepada timbangtara kerana apa yang cuma berlaku adalah bahawa defendan enggan membayar sejumlah wang kepada plaintif yang telah pun diperakui sebagai harus dibayar. Pendaftar menolak permohonan defendan. Defendan merayu.

Diputuskan, menolak rayuan dan memerintah defendan memasukkan pembelaan dalam tempoh 14 hari:

(1) Di bawah s 6 Akta Timbangtara 1952, mahkamah mepunyai budi bicara sama ada untuk memerintah penggantungan prosiding sementara menunggu rujukan kepada timbangtara. Di sini, plaintif telah menunjukkan sebab yang mencukupi mengapa kesan tidak harus diberikan kepada fasal timbangtara (lihat ms 55E–F).

(2) Dengan membuat sebahagian bayaran ke atas wang yang diperakui harus dibayar di bawah sijil muktamad, defendan telah mengakui ketepatan amaun yang dinyatakan dalam sijil muktamad. Justeru itu defendan harus diestop daripada mempertikaikan ketepatan atau kesahihan sijil muktamad (lihat ms 55H–56A).

(3) Sijil muktamad, yang dikeluarkan oleh professional bebas yang digaji oleh defendan, merupakan keterangan konklusif ke atas kerja-kerja yang dijalankan dan disempurnakan dengan wajarnya menurut syarat kontrak. Justeru itu tiada 'pertikaian' untuk dirujuk kepada timbangtara (lihat ms 56A–C).

(4) Tuntutan plaintif bersifat kewangan dan aduan defendan, andainya benar, tidaklah bersifat begitu teknikal hinggakan memerlukan khidmat seorang timbangtara pakar (lihat ms 56E–F).

(5) Defendan telah menafikan penerimaan sijil muktamad, satu syarat yang mendahului bayaran. Walau bagaimanapun, keterangan menunjukkan bahawa defendan telah diberikan sijil muktamad (lihat ms 56F–G).]

Notes

For cases on stay of proceedings generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4272–4332.

Cases referred to

Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd [1986] 1 MLJ 177 (refd)

Hashim bin Majid v Param Cumaraswamy & Ors [1993] 2 MLJ 20 (refd)

Legislation referred to

Arbitration Act 1952 s 6

Lim Chong Fong (*Azman Davidson & Co*) for the appellant/defendant.
Choong Pee Choy (*Choong & Co*) for the respondent/plaintiff.

Mohd Ghazali J: This is an appeal by the defendant against the decision of the learned senior assistant registrar who dismissed the defendant's application to stay all proceedings pursuant to s 6 of the Arbitration Act 1952 ('the Act').

Background

By a building contract ('the contract') dated 12 May 1994 entered between the plaintiff (which was then known as I & P Fletcher Binaan Sdn Bhd) of the one part and the defendant of the other part, the defendant engaged the plaintiff to construct and complete the superstructure works of a proposed condominium to be known as the Seri Duta Condominium ('the said works') situated on land held under Lot 764 Jalan Ledang, off Jalan Duta, Kuala Lumpur, at the contract price of RM32,730,898.81 and upon the terms and conditions set out therein.

It is the plaintiff's case that —

(i) upon completion of the said works, the project architect pursuant to the contract did issue a final certificate dated 16 September 1997 wherein the sum of RM1,654,501.09 was stated to be due and payable by the defendant to the plaintiff; it was also stated therein that payment had to be made by 15 October 1997;

(ii) by an AR registered letter dated 15 December 1997 the plaintiff's solicitors demanded payment of the said sum of RM1,654,501.09 from the defendant;

(iii) on 4 February 1998, in response to the plaintiff's aforesaid demand,

A the defendant paid a sum of RM231,000 to the plaintiff leaving a balance sum of RM1,423,501.09 which remains outstanding to date;

(iv) by an AR registered letter dated 5 March 1998, the plaintiff's solicitors wrote to the defendant demanding payment of the said outstanding sum of RM1,423,501.09 to which the defendant to date has failed, refused and/or neglected to comply with.

B

On 2 June 1998, the plaintiff filed this suit praying for judgment for the sum of RM1,423,501.09 together with interest at the rate of 8% per annum from 15 October 1997 till date of full settlement thereof and costs. On 25 June 1998, the defendant entered conditional appearance and on 30 July 1998 filed this application (encl 10) praying for the following orders:

C

(a) that the proceedings be stayed pursuant to s 6 of the Act;

(b) that if the order prayed for in para (a) above is not granted, the defendant be given leave to file its statement of defence within one month from the date of such refusal; and

D (c) costs.

In its affidavit in support of the application the defendant pointed out cl 34(1), entitled 'Arbitration', of the contract which provides that in the event any dispute or difference should arise between the employer, ie, the defendant or architect on its behalf and the contractor, ie, the plaintiff either during the progress or after the completion or abandonment of the works, as to any matter or thing of whatsoever nature arising thereunder or in connection therewith, then such disputes or differences shall be referred to arbitration. The said cl 34(1) also read:

E

> Upon the disputes or differences having arisen any party may serve written notice on the other party that such disputes or differences shall be referred to an arbitrator to be agreed between the parties or failing agreement or absence of reply or reluctance to act by the other party then the party may, after the expiry of fourteen days from the date of the notice to concur on the appointment of an arbitrator, apply to the president or vice-president for the time being of Pertubuhan Arkitek Malaysia to appoint an arbitrator and such arbitrator so appointed shall by virtue of this agreement be deemed to be appointed with the agreement and consent of the parties to the contract.

F

G

In its affidavit, the defendant also referred to cl 30(6) of the contract which read:

> So soon as is practicable but before the expiration of three months from the end of the defects liability period stated in the appendix to these conditions or from completion of making good defects under cl 15 of these conditions or from receipt by the architect of the documents referred to in para (b) of sub-cl (5) of this condition, whichever is the latest, the architect shall issue the final certificate. The final certificate shall state:
>
> (a) The sum of the amount paid to the contractor under interim certificate and the amount named in the said appendix as limit of retention fund, and
>
> (b) The contract sum adjusted, as necessary in accordance with the terms of these conditions,

H

I

and the difference (if any) between the two sums shall be expressed in the said certificate as a balance due to the contractor from the employer or to the employer from the contractor as the case may be. Subject to any deductions authorized by these conditions, the said balance as from the fourteenth cay after presentation of the final certificate by the contractor to the employer shall be a debt payable by the employer to the contractor or as the case may be as from the fourteenth day after issue of the final certificate shall be a debt payable by the contractor to the employer.

In its affidavit, the defendant contended that the said final certificate dated 16 September 1997 did not comply with cl 30(6)(a) and (b) of the contract and hence cannot be said to be a final certificate as claimed by the plaintiff. The defendant also contended there are defects in the said works which could not be brought up during the inspection of the said works. To support this contention, the defendant annexed to its affidavit a list of defects discovered between September 1997 and March 1998. The defendant then claimed as a result of the defective works, it had to employ a third party to carry out remedial works. It is the defendant's stand that as the defective works are tantamount to a breach of contract, it has a defence and/or counterclaim and/or a set-off against the plaintiff. It was ready and willing to refer the dispute with the plaintiff to arbitration and had on 14 April 1998 written to the plaintiff as follows:

Dear Sirs,

NOTICE TO REFER TO ARBITRATION — Superstructure Works in The Proposed Luxurious Condominium Development on Lot 764, Jalan Ledang, off Jalan Duta for Rich Avenue Sdn Bhd

We refer the above.

Since we cannot agree on the final accounts, we hereby give you notice of our intention to refer this dispute to arbitration and the appointment of an arbitrator acceptable to both parties.

We await your early reply.

The defendant pointed out that notwithstanding the above letter, the plaintiff went on to file the action. In relation to the action, the defendant insists it has not taken any further step as it is still hopeful that the matter can be referred to arbitration as provided for in the contract.

In its affidavit in reply, the plaintiff stated the following:

(1) The defendant had engaged one GDP Architects Sdn Bhd ('the said architect') as the consultant architect for the said Seri Duta Condominium Project and one HR Associates as the chartered quantity surveyors ('the said chartered quantity surveyor').

(2) The said works were completed on or about 15 October 1994 and the said architect did issue its certificate of practical completion dated 15 October 1994.

(3) Pursuant to cl 15 of the contract, the defects liability period was to expire 12 months from the day named in the certificate of practical completion; the expiry date was 15 October 1995.

(4) The said architect did issue, pursuant to cl 15 of the contract, a schedule of defects for defects discovered during the defects liability period and all such defects save for minor ongoing rectification works on roof leakage would then be rectified by the plaintiff to the said architect's satisfaction. Any defects arising after the said defects liability period are no longer the concern of the plaintiff unless there are inherent defects which could not be reasonably discovered during the said period. Anyway, in relation to this, the said architect had on 19 December 1996 issued a 'making good defects' certificate which states 'Under the conditions of the building contract, we certify that all outstanding items and work on all defects, shrinkages and other faults which appeared during the defects liability period in respect of items on defects list issued on 12 December 1995 were completed and made to our satisfaction on 24 October 1996 subject to ongoing rectification on roof leakage and we declare that the residue of the retention moneys deducted under previous certificates be released'.

(5) The said architect has certified release of all the retention sums under cl 30(4) of the contract and all such retention sums have been paid to the plaintiff.

(6) The plaintiff has, pursuant to cl 30(5) of the contract, submitted all documents to the said architect necessary for the purpose of the computations required for the preparation of the final certificate.

(7) As a result thereof, the said architect on 16 September 1997 issued a Final Certificate after it received from the said chartered quantity surveyor a final valuation dated 11 September 1997. The final certificate issued by the said architect and addressed to the defendant stated, inter alia, 'We hereby certify that under the terms of the building contract the sum of Ringgit Malaysia One Million Six Hundred and Fifty-Four Thousand Five Hundred and One and cents Nine Only (RM1,654,501.09) is now due to CCG Concrete Construction (M) Sdn Bhd ... Please make payment direct to the contractor on or before 15 October 1997 in accordance with the terms of the contract and advise us by signing and returning the copy of this certificate when you have done so'.

(8) By letter dated 19 September 1997 the plaintiff submitted to the defendant the said final certificate for payment requesting that payment be made by 15 October 1997.

(9) On 19 December 1997 the said architect issued a revised final certificate which was also sent to the defendant by the plaintiff on the same date. The amount stated in the revised final certificate as due to the plaintiff is the same as in the earlier final certificate, ie, RM1,654,501.09.

(10) Ever since the submission of both certificates, the defendant has 'procrastinated in payment thereof often citing financial and cash flow problems'. Only after persistent demands did the defendant on or around 4 February 1998 make a part payment of RM231,000 leaving

a balance sum of RM1,423,501.09 still outstanding and due under the revised final certificate. A

(11) The defendant did not when making part payment of the said sum of RM231,000 indicate that the same was made under protest or without prejudice and accordingly, the defendant is said to have accepted the revised final certificate. B

(12) Pursuant to cl 30(7) of the contract, by virtue of the defendant not exercising its right to arbitration therein, the revised final certificate is conclusive evidence that the said works have been properly carried out and completed in accordance with the terms of the contract and that any necessary effect had been given to all the terms of the contract which require an adjustment to be made to the contract sum; cl 30(7) of the contract reads: C

> Unless a written request to concur in the appointment of an arbitrator shall have been given under cl 34 of these conditions by either party before the final certificate has been issued or by the contractor within 14 days after such issue, the said certificate shall be conclusive evidence in any proceedings arising out of this contract (whether by arbitration under cl 34 of these conditions or otherwise) that the works have been properly carried out and completed in accordance with the terms of this contract and that any necessary effect has been given to all the terms of this contract which require an adjustment to be made to the contract sum, except and in so far as any sum mentioned in the said certificate is erroneous by reason of: D E
>
> (a) Fraud, dishonesty or fraudulent concealment relating to the works, or any part thereof, or to any matter dealt with in the said certificate;
>
> (b) Any defect (including any omission) in the works, or any part thereof which reasonable inspection or examination at any reasonable time during the carrying out of the works or before the issue of the said certificate would not have disclosed; or F
>
> (c) Any accidental inclusion or exclusion or any work, material goods or figure in any computation or, any arithmetical error in any computation.

(13) It is the plaintiff's stand that 'it is rather strange that the defendants are alleging such defects now when the said architect and the chartered quantity surveyor engaged by them have never raised these defects in their final certificates'. G

(14) The defendant's application is totally without any merits and is made as an engine of delay or otherwise to frustrate the resolution of whatever perceived disputes the defendant claims to have. In short it is the plaintiff's belief that: H

(i) there is no prima facie dispute or difference that falls within the purview of the arbitration clause in the contract;

(ii) there is no dispute or difference that has arisen under or in connection to the said works; I

(iii) there is already an admitted claim when the defendant made part payment on the revised final certificate unconditionally;

(iv) the defendant is estopped and/or precluded from raising the genuineness or otherwise of the revised final certificate as it has failed to exercise its right to arbitration under cl 30(7) of the contract.

In conclusion, the plaintiff contends that it has shown sufficient cause as to why the alleged disputes should and need not be referred to arbitration. The plaintiff also contends that as the court has the ultimate discretion to determine whether to stay these proceedings or to proceed to dispose of this action, such discretion should be exercised in favour of the plaintiff.

As discussed at the outset, the learned senior assistant registrar dismissed the defendant's application for a stay of the proceedings, hence this appeal. Section 6 of the Act entitled 'Power to stay proceedings where there is submission to arbitration' reads:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred In accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

What is clear from the above provision is that the court has a discretion whether to grant a stay of proceedings and refer the matter to arbitration. Are there sufficient reasons for refusing the stay?

Counsel for the defendant raised four matters which he claims are the disputes or differences that must be referred for arbitration, namely:

(1) On 19 December 1996 the said architect issued a purported certificate of making good defects certifying that all outstanding items and all defects, shrinkages and other faults in respect of items on the defects list issued on 12 December 1995 were completed to their satisfaction on 24 December 1996 'subject to ongoing rectification on roof leakage'. It is the defendant's stand that this certificate is bad for non-compliance with the contractual requirements of cl 15(4) of the contract. Clause 15(4) of the contract reads:

> When in the opinion of the architect any defects, shrinkages or other faults which he may have required to be made good under sub-cll (2) and (3) of this condition shall have been made good he shall issue a certificate to that effect, and completion of making good defects shall be deemed for all the purposes of this contract to have taken place on the day named in such certificate.

Counsel submitted that this certificate is bad for non-compliance with the said cl 15(4) of the contract, viz, it is ambiguous and uncertain as on the one hand it states that all defects have been completed to their

satisfaction but on the other hand there is still ongoing rectification works to be carried out. As such the said architect was not entitled to issue a final certificate at all.

(3) The purported final certificate is bad by reason that it does not comply with the formalities required by cl 30(6)(a) of the contract by stating the sum of the amount paid to the plaintiff under interim certificates and the amount named in the said appendix as limit of retention fund. Further, there is also no provision in the contract to revise the final certificate and the said architect's act of doing so is ultra vires.

(3) The purported final certificate had not been presented by the plaintiff to the defendant; the presentation of the final certificate is a condition precedent to payment as provided for under cl 30(6) of the contract and in the premise, the plaintiff's claim has not yet accrued.

(4) The defendant further contends that there are further latent defects discovered in the works even post the issuance of the purported final certificate and in the circumstances that certificate is not final and conclusive and the defendant is entitled to set off or counterclaim thereunder for damages to the defective works.

On the whole counsel submitted the stay of proceedings ought to be granted for the parties to refer to arbitration the issue on the validity of the said final certificate together with the associated issue of defective works.

In his submission counsel for the plaintiff argued there are no disputes or differences between the plaintiff and the defendant which invokes the operation of the said s 6 of the Act; and whatever disputes or differences raised by the defendant 'are fabricated ones or mere afterthoughts designed to delay or frustrate the expedient disposal of the plaintiff's claim herein'. He pointed out the said architect and the said chartered quantity surveyor for the work were both appointed by the defendant and not the plaintiff. The said architect had issued the final certificate in accordance with the contract viz:

(i) the final certificate dated 16 September 1997 was issued after the said chartered quantity surveyor's own valuation dated 11 September 1997 and the said architect sent this final certificate to the plaintiff which was carbon-copied to the defendant and the plaintiff thereafter sent the said certificate to the defendant vide its letter dated 19 September 1997;

(ii) the revised final certificate dated 19 December 1997 clearly shows the defendant received it on 23 January 1998.

Counsel stressed despite the issuance of the various certificates pursuant to the contract, ie, from the certificate of practical completion to the revised final certificate for a period ranging from October 1994 to December 1997, there was not one single instance of a complaint from the defendant during or even after this period that any of the certificates was defective, not in compliance with the provisions of the contract or in any manner incorrect. He stressed that the certificates mentioned above were issued by the

A defendant's own consultants and if such consultants were not satisfied as to the correctness of the contents therein, then it is submitted that the certificates would not have been issued in the first place. Although it is correct that there were 'ongoing rectification works' mentioned in the certificate of making good defects, by the time the architect's final certificate of payment including its revised final certificate were issued, the said B 'ongoing rectification works' were never again mentioned which would clearly denote that the said architect must have been satisfied that such works have been completed. Despite the defendant's claim that there were numerous defects and complaints, strangely none of these complaints was raised by either the said architect nor the said chartered quantity surveyor C or any of the defendant's other consultants at any material time. It is submitted that the defendant had ample opportunities of challenging the correctness or otherwise of its own consultants' certificates but this was never done until legal proceedings were afoot. Even stranger still, no evidence had been tendered by the defendant that any of these complaints had been brought to the notice of the plaintiff. Despite all these complaints D and accusations of non-compliance by their own consultants in issuing the relevant certificates, the defendant not only released all retention sums but made unconditional part payment on the revised final certificate. In relation to the four disputes or differences raised by the defendant, counsel for the plaintiff argued these do not constitute actual disputes or differences.

E In *Hashim bin Majid v Param Cumaraswamy & Ors* [1993] 2 MLJ 20, Anuar J (as he then was) said (at p 25):

> Under s 6 of the Arbitration Act 1952, the court has a discretion either to stay or refuse a stay of proceedings pending arbitration. The onus is on the party who wishes to object to any stay of proceedings to show why the arbitration clause should not be given effect.

F

In the instant case, I am of the view that the plaintiff has shown sufficient cause why the arbitration clause should not be given effect. The facts show the said architect issued a final certificate dated 16 September 1997 wherein the sum of RM1,654,501.09 was stated to be due and payable by the G defendant to the plaintiff and that payment was to be made by 15 October 1997. By letter dated 15 December 1997 the plaintiff's solicitors demanded payment of the said sum. Consequently on 19 December 1997 the said architect issued a revised final certificate and the amount stated therein as due to the plaintiff is the same. There is nothing to show that the defendant has made any challenge to either of the said certificates. The evidence then H shows that on 4 February 1998 the defendant paid a sum of RM231,000 to the plaintiff leaving a balance sum of RM1,423,501.09 which is the amount that the plaintiff is claiming in this action. There is nothing to show that that part payment of RM231,000 was made under protest or with conditions attached. That being the case, I would agree with counsel for the plaintiff that by the defendant's act in making part payment on the revised final I certificate unconditionally and/or without objections, the defendant is estopped and/or precluded from stating that the said revised final certificate is now disputed as to its correctness or validity. That act of part payment to

me would amount to an admission of the correctness of the amount stated in the revised final certificate. Furthermore, pursuant to cl 30(7) of the contract, discussed earlier, that final certificate is conclusive evidence that the works have been properly carried out and completed in accordance with the terms of the contract. In *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177, it was held that where a claim is admitted it does not call for a settlement by arbitration. At p 179, George J said:

> In my judgment what we have is a mere refusal to pay upon a claim which has been admitted as being owing to the plaintiffs. There is nothing to be settled by arbitration. On a true construction of cl XIV only claims which are bona fide disputes or are bona fide controversies call for settlement by arbitration. Where a claim is admitted it does not call for a settlement by arbitration. All that is called for is payment of the admitted amount which can be by an action in the courts as has been done in the instant case.

In the instant case the evidence shows the said architect and the said chartered quantity surveyor were satisfied that the said works had been properly carried out and completed in accordance with the terms of the contract and that would have been the basis for them to cause the final certificate and consequently the revised final certificates to be issued. The said architect and the said chartered quantity surveyor were engaged by the defendant and being independent professionals in their respective fields, I would not think that they would cause those certificates to be issued if the said works had not been carried out to their satisfaction pursuant to the terms of the contract.

I would agree with counsel for the plaintiff that the plaintiff's claim is basically of a monetary nature and the complaints of the defendant, even if justified, do not appear to be so technical in nature that an expert arbitrator is required to adjudicate upon the issues as raised by the defendant in this application. In attempting to fortify its application, the defendant claims the 'purported final certificate' has not been presented by the plaintiff and as the presentation of the final certificate is a condition precedent to payment as provided for under cl 30(6) of the contract, the plaintiff's claim has not yet accrued. The facts, to me, show that the defendant had been given both the final certificate and the revised final certificate and as such I cannot see how this averment can stand. If that is the correct state of affairs as claimed, why then the part payment?

On the whole, I am satisfied that the plaintiff, in opposing the stay, has discharged the onus. It has forwarded sufficient reasons for the court to exercise its discretion in refusing a stay and that being the case, I would dismiss this appeal with costs. I would also give leave to the defendant to file its statement of defence within 14 days from today.

Appeal dismissed.

Reported by Andrew Christopher Simon